Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Nicholas Lohman,

Petitioner,

v.

Duryea Borough; Duryea Borough Council; Ann Dommes, Individually and in her official capacity as Council President; Lois Morreale, Individually and in her official capacity as Borough Secretary; Frank Groblewski, Individually and in his official capacity as Councilman; Edward Orkwis, Individually and in his official capacity as Councilman; Robert Webb, Individually and in his official capacity as Councilman; Audrey Yager, Individually and in her official capacity as Councilwoman; Joan Orloski, Individually and in her official capacity as Councilwoman.

Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court will endorse the holdings of the 2nd, 4th and 10th Circuits that "settlement negotiations" cannot be used to reduce a fee petition or the 3rd and 7th Circuits' pronouncement that "settlement negotiations" even when not FRCP 68, Offers of Judgment, can be used to reduce a fee request?

II. Whether an enhancement is warranted in cases in which defendants make a lower settlement offer than the jury verdict?

III. Whether hourly rates from the defense bar can rebut the market rate of plaintiff's counsel?

List of Parties

[x] All parties appear in the caption of the case on the cover page

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In the Supreme Court of United States
Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix to the petition and is

[x] reported at 574 F.3d 163 (3d Cir. 2009)

The opinion of the United States district court appears at Appendix to the petition and is

[x] reported at 2008 U.S. Dist. LEXIS 57981

Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit affirming the district court's decision reducing the lodestar by more than 50% in Lohman's civil rights case was entered on July 23, 2009. A Petition for Rehearing En Banc was denied on December 22, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

Plaintiff Nicholas Lohman brought an action against Duryea Borough and its officials (hereinafter referred to as "Duryea Borough") in the Middle District of Pennsylvania alleging violations of his constitutional rights.

After three (3) years of litigation, Duryea Borough, *during trial*, offered $75,000.00 to resolve the case. Lohman rejected the settlement offer.

A jury determined that Duryea Borough violated Lohman's First Amendment rights and awarded him $12,220.

Lohman's counsel requested attorney's fees and costs in the amount of $112,883.73, the district court arrived at a lodestar fee of $62,986.75. Although not requested by Duryea Borough, the district court further reduced the lodestar by more than 50%, and awarded the flat fee of $30,000.00 based on Lohman's rejection of the settlement offer during trial.

Lohman requested the hourly rate of $300, and the district court used Duryea Borough's counsel's rate, who had been practicing a similar numbers of years, to award the rate of $215.

Lohman appealed the district court's reduction of attorney's fees to the Third Circuit, which affirmed the district court's ruling. Lohman then moved for a rehearing *en banc*, which was denied. This appeal followed.

Argument

I. There is a split in the circuits as to whether settlement negotiations can be used to reduce a fee petition, and therefore, this petition meets this Court's standard of compelling reason for review on a writ of certiorari

Petitioner respectfully requests that this Court accept review of his petition for writ of certiorari to the Third Circuit Court of Appeals. There is a split in the circuits as to whether settlement negotiations can be used to reduce a fee petition. Although the Seventh and Third Circuits have held that settlement negotiations can be used to reduce a fee petition, the Second, Fourth, and Tenth Circuits declined to use hindsight to reduce a successful civil rights' fee petition.

In *Ortiz*, the Second Circuit reversed the district court in its refusal to award attorney fees for a nominal award. *Ortiz v. Regan*, 980 F.2d 138, 140 (2nd Cir. 1992). The Court emphasized that "[a] district court should not rely on informal negotiations and

hindsight to determine whether further litigation was warranted and, accordingly, whether attorney's fees should be awarded". *Ortiz,* 980 F.2d at 140.

Moreover, the Court noted that "a rule giving trial judges discretion to deny such fees where the refusal of an offer is shown after the fact to have been unwise might well lead to very uneven results and even misuse in cases in which judges become involved in settlement negotiations". *Ortiz*, 980 F.2d at 140. The Court reasoned that Federal Rule of Civil Procedure 68 provided a process that the defendant could employ, but yet chose not to do so.

Similarly in *Cooper*, the Tenth Circuit reversed the district court's reduction of lodestar figure based on simplicity of claim and settlement negotiations. *Cooper v. State of Utah*, 894 F.2d 1169, 1172 (10th Cir. 1990). In that case, the Court noted that "[r]educing the lodestar amount because the issues are simple could lead to the incongruous result of attorneys being less likely to takes cases where a person's civil rights have been obviously and clearly violated." *Cooper*, 894 F.2d at 1172.

The Court noted that "the court's downward adjustment of fees based on settlement negotiations is not well-founded. Rule 68 Fed. R. Civ. P. provides a practical tool by which parties may protect themselves against costs. Nothing in the record indicates that the Defendants-Appellees availed themselves of an offer of judgment pursuant to Rule 68." *Cooper*, 894 F.2d at 1172. The Court reversed the district court's reduction and set the attorney fees at the lodestar amount.

Likewise in *Clark*, the Fourth Circuit reversed the district court's decision to deny attorney fees after

a settlement offer was made. *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994). In that case, the jury award $1.00 and the attorney had sought fees of $120,000.00. *Clark*, 28 F.3d at 423. The Court noted that "[b]ecause the district court limited appellant's recovery of attorney's fees based on settlement offer which failed to meet the requirements of Rule 68, its decision must be vacated ... the court must be guided by the principle that mere settlement negotiations may not be given the effect of a formal offer of judgment." *Id.*

Here, unlike the courts in *Ortiz, Cooper, Clark*, the lower courts improperly considered settlement negotiations to reduce Lohman's attorney fees' request. After determining the lodestar figure of $62,986.75, the court used settlement negotiations to further reduce the lodestar by over 50% to $30,000.00 yet Duryea Borough had not requested the same.

The district court stated that "... Plaintiff will be awarded a total of thirty thousand dollars ($30,000.00) in attorney's fees. Such an award is comparable to the award Plaintiff's counsel would have received had the Plaintiff settled for the maximum settlement offer, and substantially greater than one she would have received under a normal contingent fee of the verdict". *Lohman v. Duryea*, 05-1423, page 24.

In essence, the lower courts have punished Lohman for not accepting a settlement offer during trial; however, he had no idea that punitive damages would be taken away from the jury's consideration, the amount the jury would award in damages, or that the court will not consider almost three (3) years of attorney fees.

Like the Third Circuit, the Seventh Circuit held

that "[s]ubstantial settlement offers should be considered by the district court as a factor in determining an award of reasonable attorney's fee, even where Rule 68 does not apply." *Moriarty v. Svec*, 233 F.3d 955 (7th Cir. 2000), *cert denied*, 2001 U.S. LEXIS 4742.

The result of using "settlement negotiations" against a plaintiff actually makes civil rights cases about money and not the congressional purpose of vindicating constitutional violations. Often civil rights victims want public acknowledgement that they were harmed, which does not translate into a monetary amount.

If this Court affirms the Third and Seventh Circuit's pronouncement that litigants can forgo using the Federal Rules, in particular Rule 68, Offers of Judgment, yet still obtain the same results. It follows that defendants who make settlement offers below the jury award, then should be penalized by way of an attorney fee enhancement because of that low settlement offer.

The congressional purpose of awarding fees in civil rights cases is not support by the Third Circuit's rationale, which punishes plaintiffs for not accurately predicting what will occur at trial. Consequently, it was erroneous to hold settlement negotiations against Lohman.

II. Hindsight should not be a basis for a blanket reduction of attorney fees over 50% since it frustrates the purpose of awarding attorney fees for constitutional violations

By allowing successful civil rights plaintiffs to recover attorneys' fees in 42 U.S.C. § 1988(b), Congress has attempted to allow private citizens a meaningful opportunity to vindicate their constitutional rights. The awarding of attorneys' fees to successful plaintiffs facilitates private enforcement of civil rights laws, and it encourages attorneys to take cases they might otherwise forgo if their compensation depended solely upon a contingency fee.

Successful civil rights plaintiffs are ideally awarded fees based upon their reasonable rates (as determined by the rates of similarly situated and skilled local attorneys) and reasonable hours worked. The calculated amount is referred to as the "lodestar" fee, and it is only to be departed from in specific circumstances.

"Civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *Student Public Interest Research Group of New Jersey v. AT &T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988).

" ... [I]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest

by invoking the injunctive powers of the Federal Court". *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008).

Courts have realized that "[i]t must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees" ... and that "... the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker". *Moreno*, 534 F.3d at 1111. "The district court can impose a small reduction, no greater than 10 percent – a "haircut" – based on its exercise of discretion and without a more specific explanation." *Moreno*, 534 F.3d at 1112.

III. Defendants hourly rates, which are paid by the hour regardless of result, cannot be used to rebut a plaintiff's proof of current hourly market rate when paid on a contingency basis

The Third Circuit also found that the lower court's use of Duryea Borough's hourly rate was acceptable yet that hourly rate does not take into consideration that plaintiff's counsel was not receiving compensation for each and every hour regardless of result. Working under a contingency fee arrangement, Lohman's counsel did not get the benefit of being paid for each hour over the three (3) year period. Lohman's counsel did not receive compensation unless she was successful. Therefore, to compare and use defense counsel's rate was improper.

VI. Conclusion

For all the foregoing reasons, Petitioner requests that this Court grant this Petition to resolve the issue of whether "settlement negotiations" can lower/enhance a fee petition request and whether defense hourly rates can be used to reduce the market rate for civil right lawyers.

Respectfully submitted,

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March 19, 2010

APPENDIX

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3524

NICHOLAS LOHMAN,

Appellant

v

DUYREA BOROUGH; DURYEA BOROUGH COUNCIL;
ANN DOMMES, Individually and
in her official capacity as Council President;
LOIS MORREALE, Individually and
in her official capacity as Borough Secretary;
FRANK GROBLEWSKI, Individually and
in his official capacity as Councilman;
EDWARD ORKWIS, Individually and
in his official capacity as Councilman;
ROBERT WEBB, Individually and
in his official capacity as Councilman;
AUDREY YAGER, Individually and
in her official capacity as Councilwoman;
JOAN ORLOSKI, Individually and
in her official capacity as Councilwoman.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 05-cv-01423)
District Judge: Honorable A. Richard Caputo

Argued May 20, 2009

Before: RENDELL and GARTH, *Circuit Judges*,
and PADOVA, * *District Judge*.

(Filed: July 23, 2009)

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Ann Dommes; Lois Morreale; Frank Groblewski;
Edward Orkwis; Robert Webb; Audrey Yager
Joan Orloski.

OPINION OF THE COURT

RENDELL, Circuit Judge.

Nicholas Lohman appeals from the District Court's award of $30,000.00 in attorney's fees following a jury verdict in his favor in his wrongful discharge action. The jury awarded Lohman $12,205.00 in lost wages and nominal damages, after finding Appellees liable on one of Lohman's three First Amendment retaliation claims. Lohman contends that the District Court improperly considered settlement negotiations between the parties, including evidence that Lohman

rejected a settlement offer of $75,000.00, to reduce the fee award. The issue before us - namely whether and to what extent the trial court may consider settlement negotiations when awarding fees - appears to be one of first impression in our Court.[1]

I. Background

Nicholas Lohman brought an action asserting numerous claims relating to his discharge from employment with Duryea Borough. Only three First Amendment retaliation claims survived summary judgment and proceeded to trial. Defendants made three settlement offers after trail commenced, including one for $75,000.00. Lohman rejected each of these offers. The jury found for Lohman on one of the three claims, and awarded him $12,205.00 in lost wages and nominal damages. Lohman moved for attorney's fees and costs of $112,883.73.

The District Court granted the motion in part, awarding $30,000.00 in attorney's fees and $4,251.77 in costs. The District Court engaged in an extensive consideration of the lodestar, and a review of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and

[1]Lohman also challenges the hourly rate used by the District Court in determining the lodestar, which was below the rate he urged. However, there was ample evidence to support the Court's lower rate and we conclude that the Court did not clearly err in choosing the rate that it did. See *Interfaith Comty. Org. v. Honeywell Intern., Inc.*, 426_F.3d 694, 703 n.5 (3d Cir. 2005) ("[W]e will not upset a district court's factual determinations including its determination of an attorney's reasonable hourly rate and the number of hours he or she reasonably worked on the case, unless we find them to be clearly erroneous.").

referenced by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983). The District Court noted that in *Hensley*, the Supreme Court stated that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." *Lohman v. Borough of Duryea*, No. 05-1423, 2008 W.L. 2951070 (M.D. Pa. July 30, 2008) at *11 (quoting *Hensley*, 461 U.S. at 436).

The District Court then proceeded to refer to case law that had been cited by the parties regarding the propriety of considering settlement negotiations in awarding fees, including *Alphonso v. Pitney Bowes, Inc.*, 356 F. Supp. 2d. 442 (D.N.J. 2005), which was relied upon by Lohman. In *Alphonso*, defendants brought a post-trial motion for sanctions against a plaintiff, arguing that the plaintiff's unsuccessful employment retaliation claims were frivolous. *Id.* at 445. The plaintiff sought to undermine the defendants' position by offering evidence that the defendants made a settlement offer on the eve of trial. *Id.* at 447 n.4. The court disregarded the plaintiff's argument, intimating that the use of settlement discussions to show the validity or invalidity of a claim would violate Federal Rule of Evidence 408. *Id.*

However, the District Court here found another case, *EMI Catalogue Partnership v. CBS/Fox Co.*, . No. 86-1149, 1996 W.L. 280813 (S.D.N.Y. May 24, 1996), to be more relevant, and its logic more persuasive. In *EMI*, the court referred to the language of Rule 408 and considered the precise issue before us in a copyright case. The court noted that a distinction should be drawn where

> evidence of the alleged settlement negotiations is not being offered to prove "either liability for or invalidity of the claim or its amount. " Rather, it is being offered to show that the Court's rejection of the claim should not merit an award of attorney's fees under the Court's power of equitable discretion ....

Id. at *2 (quoting Fed. R. Evid. 408). Furthermore, the court noted,

> Because nothing in the language of Rule 408 requires exclusion of evidence of settlement negotiations on issues "other than liability for or invalidity of a claim or its amount," the Court can consider evidence of settlement negotiations where, as here, that evidence is probative of the objective unreasonableness of the claim for purposes of determining whether to award attorney's fees under the Copyright Act.

Id. The District Court here agreed, and concluded that evidence of settlement negotiations could be used as an indicator of the degree of success obtained by Lohman's counsel under § 1988. It stated, in so concluding: "The fact that Plaintiff prevailed at trial may not be entirely indicative of counsel's success. Therefore, the Court will consider the settlement negotiations in its determination of Plaintiff's attorney's fee award." *Lohman*, 2008 W.L. 2951070 at *12 (internal citation omitted).

The court calculated a lodestar of $62,986.75 but concluded that the award should be reduced for limited success. In reasoning through this reduction, evidence of settlement negotiations between the parties was but one consideration:

> In this case, the Court finds that the lodestar, or product of the reasonable rate times the reasonable hours, results in an excessive fee award. As per *Hensley,* a court may consider other facts in determining an award. *Hensley,* 461 U.S. at 434. The degree of success obtained for Ms. Pollick was not as great as she claims. Of the six (6) claims in the Complaint, only the First Amendment claims went to trial. Of the claims that were presented to the jury, only one (1) claim returned a verdict in favor of the Plaintiff.
>
> Furthermore, the Court notes that the Plaintiff's counsel may have achieved a much greater level of success if Plaintiff had settled the case. A seventy-five thousand dollar ($75,000.00) result in settlement is significantly greater that the twelve-thousand, two-hundred and five dollar ($12,205.00) result obtained at trial. Plaintiff noted that she worked on a contingent fee basis. Had Plaintiff settled for the seventy-five thousand dollars ($75,000.00), counsel would only have been entitled to about twenty-five thousand dollars ($25,000.00), as

contingent fee agreements often call for approximately thirty-three percent (33%). If she had a contingent fee agreement of forty-percent (40%), she would have received thirty-thousand dollars ($30,000.00). Likewise, a contingent fee of the jury's verdict would have yielded four-thousand and sixty dollars and thirty-three cents ($4068.33) and four-thousand, eight-hundred and eighty-two dollars ($4882.00) respectively.

Plaintiff's counsel argues that she achieved "excellent" results for her client, especially because this trial followed on the heels of another trial. The fact that this trial followed another is not relevant. While she focuses on the fact that she received a jury verdict in her favor, her client received a lesser result from trial that from settlement, and only prevailed on one claim. In this case, the results obtained at trial do no justify an award of over sixty-thousand dollars ($60,000.00) as calculated by the lodestar, and surely does not justify the requested fees of over one-hundred thousand dollars ($100,000.00).

The *Johnson* factors, other than the results obtained factor, also justify a reduced award. The skill requisite to perform the services was not particularly rigorous-Plaintiff's counsel often brings

> First Amendment retaliation claims, and such a claim is not a new or novel issue of law. The claims were not particularly difficult .... Counsel did not demonstrate any special ability in the prosecution of the case. The case cannot be considered "undesirable"-there is no evidence that Mr. Lohman was unable to attract other attorneys to this case. These factors weigh in favor of a downward departure from the lodestar.
>
> Based upon the *Johnson* factors, including the results obtained factor, the Court finds that a downward departure of the lodestar is warranted, and Plaintiff will be awarded a total of thirty thousand dollars ($30,000.00) in attorney's fees. Such an award is comparable to the award Plaintiff's counsel would have received had the Plaintiff settled for the maximum settlement offer, and substantially greater than one she would have received under a normal contingent fee of the verdict.

Lohman argues on appeal that the District Court erred by using evidence from settlement negotiations to reduce the fee award.

II. Discussion

In a civil rights action, a district court, "in its discretion, may allow the prevailing party ... a reasonable attorney's fee." 42 U.S.C. § 1988. It is undisputed that

Lohman prevailed in his action, but the parties disagree as to whether the fee awarded was reasonable. We have jurisdiction to review a fee award under 28 U.S.C. § 1291, once the award has been reduced to a definite amount. *Interfaith Cmty. Org. v Honeywell Int., Inc.*, 426 F 3d 694, 701 (3d Cir. 2005). While we generally review fee awards for abuse of discretion, the issue as to what standards are to be applied in determining the fee involves a question of law, and our review of the issue before us is plenary. *Washington v. Phila County Court of Common Pleas*, 89 F.3d 1031,1034-35 (3d Cir. 1996).

We agree with the District Court that Rule 408 does not bar a court's consideration of settlement negotiations in its analysis of what constitutes a reasonable fee award in a particular case. By its terms, Rule 408 requires exclusion of evidence of such negotiations "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction."[2] This was the case in *Alphonso*, relied on by Lohman in the District Court, where evidence of negotiations was

[2] Federal Rule of Evidence 408 provides in full:

(a) Prohibited uses. — Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. - This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and providing an effort to obstruct a criminal investigation or prosecution.

offered to demonstrate that the defendants believed that the plaintiff's claim had merit. We do not disagree that settlement negotiations cannot be used in this way, for the Rule clearly places settlement negotiations off limits where the validity of the claim is at issue.[3]

While evidence of settlement negotiations is inadmissible to prove the merit or lack of merit of a claim, the use of such evidence as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408. Such evidence can be relevant when comparing what a plaintiff "requested" to what the plaintiff was ultimately "awarded." We noted in *Washington* the "settled principle .... that counsel fees should only be awarded to the extent that the litigant was successful." *Washington*, 89 F.3d at 1042. *Hensley* instructs us that "[t]here is no precise rule or formula" for determining how a fee should be adjusted to reflect limited success. *Hensley, 461 U.S. at 436.* These determinations are appropriately committed to the discretion of the district court "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* at 437. While evidence of settlement negotiations is only one indicator of the measure of success, it is a permissible indicator that is not precluded by Rule 408.

Lohman urges that permitting the use of evidence from settlement negotiations to reduce attorney's fees is against public policy, because it will penalize civil rights attorney who achieve only partial success, and will

[3] Appellees refer to several cases where settlement offers were used by courts as evidence of the amount in controversy, and urge that these cases are persuasive on the issue before us. We view these cases as not sufficiently similar to warrant discussion.

discourage settlement discussions. He also argues that Appellees' failure to make an offer or judgment under Rule 68 of the Federal Rules of Civil Procedure should preclude the Court from considering settlement discussions under these circumstances.

While the asserted policy implications have superficial appeal, upon reflection they are not convincing. The concept of having reduced fees awarded based on partial success is not a new one – indeed, it is well settled in our jurisprudence. See *Hensley,* 461 U.S. at 436 ("Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained."). No exception has been made in the case law for fee awards in civil rights cases.

Moreover, the thought that settlement discussions will not now occur because an attorney could be penalized if he or she achieves less than was demanded makes little sense. In fact, permitting settlement negotiations to be considered would encourage reasonable and realistic settlement negotiations. In addition, there has been no argument made that a plaintiff's naming or rejection of a number is anything other than an indication of what the plaintiff is seeking. It comports with established law to consider what was sought as compared to what was awarded. Accordingly, the policy considerations asserted by Lohman lack a solid footing in any real policy.

We also reject Lohman's argument that the failure of Appellees to make an offer of judgment under Rule 68 should preclude the District Court from considering settlement negotiations in determining the degree of Lohman's success. Rule 68 encourages settlement by

providing a formal process by which a defendant may limit its exposure to trial costs by making a written offer of judgment more than ten days prior to trial. Fed. R. Civ. P. 68(a). If a plaintiff rejects such an offer, and obtains a less favorable judgment thereafter, the plaintiff is responsible for costs incurred after the offer was made. Fed. R. Civ. P. 68(d).

We do not disagree that Rule 68 was available to Appellees more than ten days prior to trial as a means to potentially limit subsequent costs. However, we fail to see how the existence of this Rule and availability of this strategic mechanism for limiting one's costs should preclude a district court from considering informal negotiations for the unrelated purpose of determining the extent of relief sought by a plaintiff.[4] The District Court here did not deny Lohman fees and costs incurred after the rejected offer, but merely reduced the fee award in part because Lohman was ultimately awarded substantially less than he sought.

We think it important to note that we hold only that settlement negotiations *may* be relevant in measuring success, and, if so, are clearly only one factor to be considered in the award of fees.[5] A court is also free to reject such evidence as not bearing on success when, for instance, negotiations occur at an early stage before discovery, or are otherwise not a fair measure of what a party is truly seeking in damages. Here, however, the District Court considered evidence that, during trial, Lohman rejected a settlement offer of $75,000.00, an offer more than six times the amount awarded by the jury. Lohman offers no explanation as to why his rejection of this amount is not probative of the amount he sought in damages. Nor does he offer a reason as to why a comparison between the rejected $75,000.00 offer and the

ultimate $12,205.00 jury award would not be an indication of his success in the litigation as a whole.

Accordingly, we will AFFIRM the Order of the District Court.

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[4] Moreover, the cases relied on by Lohman regarding Rule 68 are factually distinguishable and do not set forth a categorical rule that applies here. In *Ortiz v. Regan*, 980 F.2d 138 (2d Cir. 1992), the Court of Appeals for the Second Circuit rejected a district court's denial of fees for work performed by plaintiff's counsel after the defendants offered the plaintiff a post-deprivation hearing. Instead of requesting a hearing, plaintiff proceeded with her due process claim based on defendants' conduct prior to the suspension of her retirement benefits. The court of appeals stated that the "availability of Rule 68" provided "additional weight" for its conclusion that the district court abused its discretion by cutting off all fees incurred after the rejected offer. *Id.* at 141. The District Court here did not cut off all fees incurred after Lohman rejected Appellees' settlement offer.

In *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), the Court of Appeals for the Fourth Circuit concluded that a district court erred in applying Rule 68, because the offer in question did not meet the formality requirements of the Rule. *Id.* at 423. The case at bar does not involve any application of Rule 68.

In *Cooper v. Utah*, 894 F.2d 1169 (10th Cir. 1990), the Court of Appeals for the Tenth Circuit determined that a district court erred by reducing a fee award to one half of the lodestar based on simplicity of issues, because simplicity of issues should have been factored into the determination of the lodestar. *Id.* at 1171. In a terse statement, the court "[a]dditionally" noted that the district court's reduction of fees in light of settlement negotiations was "not well-founded" where defendants failed to make an offer of judgment under Rule 68. *Id.* at 1172. There is no indication that the district court's use of settlement negotiation in *Cooper* was analogous to the application in this case, nor is it clear that the settlement issue was necessary to the holding on appeal.

[5] Here, as the District Court's analysis quoted above makes clear, the Court considered many factors, including the degree of Lohman's success, before awarding a fee of $30,000, roughly one half of the lodestar.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Nicholas Lohman,	:	
	:	
Plaintiff,	:	NO. 3:05-CV-1423
	:	
v.	:	(JUDGE CAPUTO)
	:	
Duryea Borough, et al.,	:	
	:	
Defendants	:	

MEMORANDUM

Presently before the Court is Plaintiff Nicholas Lohman's motion for attorneys' fees and costs. (Doc. 109.) For the reasons set forth below, Plaintiff's petition will be granted in part and denied in part. Plaintiff's counsel will be awarded thirty thousand dollars ($30,000.00) in attorney's fees for her work and the work of her assistants. Plaintiff will be awarded four-thousand, two-hundred and fifty-one dollars and seventy-seven cents ($4251.77) in costs.

BACKGROUND

Plaintiff Nicholas Lohman brought an action against Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager, and Joan Orloski alleging violations of the procedural component of the Fourteenth Amendment, First Amendment retaliation claims, publicity given to private life, and wrongful discharge. (Compl. Doc. 1.) In its November 29, 2007 Memorandum and Order, the Court granted Defendants' motion for summary judgment on the Fourteenth Amendment due process claims, the claim for publicity given to private life, and the wrongful discharge claim. (Mem. & Order, Nov. 29, 2007, Doc. 56.) A jury trial was held on the remaining claims for First Amendment retaliation. Defendants Orwkis and Morreale were dismissed from the case on a Rule 50 motion after the close of Plaintiff's case. The jury then rendered a verdict on April 23, 2008 in favor of Plaintiff Lohman, for his First Amendment retaliation claim with respect to his assistance in filing a grievance, against Defendants Duryea Borough, Ann

Dommes, Frank Groblewski, Audrey Yager, and Joan Orloski. (Doc. 102.) The jury found in favor of Defendant Robert Webb, however, on Plaintiff's claim of retaliation with respect to the assistance in filling a grievance. (Doc 102.) The jury found in favor of all Defendants on Plaintiff Lohman's claims for First Amendment retaliation with respect to his union contract negotiations. (Doc. 102.) For Plaintiff's successful claims, the jury awarded damages for lost wages in the amount of seven-thousand, three–hundred and twenty dollars ($7320.00) against Defendants Duryea Borough, and one-thousand, two hundred and twenty dollars ($1220.00) each against Ann Dommes, Frank Groblewski, Audrey Yager, and Joan Orloski. (Doc. 102) The jury also awarded one dollar ($1.00) in nominal damages for damages other than wage loss against Defendants Duryea Borough, Ann Dommes, Frank Groblewski, Audrey Yager, and Joan Orloski. (Doc. 102.) On July 1, 2008, the Court granted in part Plaintiff's motion for prejudgment interest. (Doc. 120.)

In the present motion, Plaintiff requests attorneys' fees and costs in the amount of one-hundred and twelve-thousand, eight–hundred and eighty-three dollars and seventy-three cents ($112,883.73). (Doc. 109.) No other post-trial motions are pending, and no appeals have been taken. Therefore, the Court will decline Defendants' request to defer the ruling on attorney's fees. The motion is fully briefed and ripe for disposition.

DISCUSSION

The Court may award reasonable attorney fees and costs to the prevailing parties in § 1983 cases. See 42 U.S.C. § 1988 (b). Plaintiffs "may be considered ' prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). However, "[t]his is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable.'" *Id.*

I. Attorney's Fees – Reasonable Hours and Reasonable Fees

The United States Supreme Court has held that the "initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on litigation times a reasonable hourly rate." *Blum v. Stetson,* 465 U.S. 886, 888 (1984). This amount is known as the "lodestar" figure, which is presumed to be the reasonable fee. *Pennsylvania v. Delaware Valley Citizens' Counsel,* 478 U.S. 546, 565 (1986); *Pennsylvania v. Delaware Valley Citizens' Counsel,* 483 U.S. 711, 730-31 (1987).

In calculating the reasonable rate, the Court looks to the prevailing market rates in the relevant community. *Loughner v. Univ. of Pittsburgh,* 260 F. 3d 173, 180 (3d Cir. 2001). The Court should considered the experience and skill of the prevailing party's attorney, and compare the rates to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Maldonado v. Houstoun,* 256 F. 3d 181,

184 (3d Cir. 2001). The prevailing party bears the burden of demonstrating that the requested hourly rates are reasonable. *Id.*

The Court must also determine whether the number of hours spent on the litigation was a reasonable number of hours. The Court "should review the time charged, decide whether the hours claimed were reasonably expended for each of the particular purposes described, and then exclude those that are 'excessive, redundant, or otherwise unnecessary.'" *Pub. Interest Research Group of N.J., Inc. v. Windall,* 51 F.3d 1179, 1188 (3d Cir. 1995) (citations omitted). Thus, a trial court will "exclude from this initial fee calculation hours that were not reasonably expended on the litigation." *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983). Thus, using the lodestar methodology, the Court can calculate a reasonable attorney's fee. Here, Plaintiff suggests a rate of three-hundred dollars ($300.00) per hour, for a total of three-hundred and fifty-six (356) hours.

A. Reasonable Hours

Defendants argue that the number of hours requested by Plaintiff Lohman should be further reduced as a number of these hours overlap with the case of *Guarnieri v. Duryea Borough, et al.* Defendants also argue that a number of hours should be reduced as inappropriate, such as time spent speaking to the press. Finally, Defendants argue that some of Plaintiff's time entries are excessive, and therefore should be reduced. The district court is to exclude from its fee calculation hours that were not "reasonably expended." *Hensley*, 461 U.S. at 434. Therefore, the Court will address Defendants' arguments in turn.

1. Overlap with *Guarnieri* Case

First, Defendants argue that a number of Plaintiff's hours are duplicative of the *Guarnieri v. Duryea Borough, et al* .case. Plaintiff has submitted a document detailing eighty-eight (88.00) hours of work in the year 2006 done in support of both Plaintiff Lohman and the companion case of Charles Guarnieri.

Plaintiff admits that these eighty-eight (88.00) hours of work were done in support of both cases, and Defendants object to a full recovery of these hours so as not to duplicate fees. Plaintiff requests that all fees be granted to either Lohman or Guarnieri, and that the fee request not be split in half. However, to split these hours in half is the most logical and fair way to deal with these fees. If the clients were paying the fees direclt,y neither client would be charged the full amount for work done in support of the two (2) cases; counsel would likely charge each client half of the full amount. Therefore, the Court will treat the fees in the manner in which the clients would be treated. *See Publ. Interest Research,* 51 F.3d at 1188. Such a reduction would not be a "global" reduction, as suggested by the Plaintiff. Rather, it is a reflection of the way in which a client would be billed. The number of hours will be divided in half, and Plaintiff's fees for hours worked on both Lohman and Guarnieri will be reduced to forty-four (44.00) hours.

Defendants also indicate that an additional fifteen

and eight-tenths (15.80) hours of Ms. Pollick's time should be reduced as duplicative of the *Guarnieri* case. Attorney Pollick has indicated that eighty-eight (88.00) hours of her work were duplicative. But, her list of duplicative hours only considers work done in the year 2006. She lists no duplicative work for the years 2005, 2007, or 2008. The Court has reviewed the specific objections Defendants have made to duplicative time entries. The Court finds that the complained of time in 2005 is duplicative of the *Guarnieri* case. The hours billed to Lohman were also billed to Guarnieri, for the same amount of time and with the same description. Therefore, the 2005 hours complained of will be reduced by fifty percent (50%). The hours will be reduced from two and four-tenths (2.40) hours to one and two-tenths (1.20) hours.

Defendants also claim that a number of hours in March and April 2008 were duplicative. After comparing the hours submitted for the *Guarnieri* and *Lohman* cases, the Court notes that the hours that were included in both time sheets were the two (2.00)

hours on March 24, 2008, the two-tenths (0.20) hours on March 26, 2008, and the one (1.00) hour on April 3,. 2008. The other hours complained of were not listed in the *Guarnieri* time sheets, and therefore are not duplicative. Therefore, the Court will only reduce hours on those three (3) days, from three and two-tenths (3.20) hours to one and six-tenths (1.60) hours.

In total, the Court will reduce Plaintiff's hours by forty-six and eight-tenths (46.80) hours based on duplicativeness.

2. Inapplicable Hours

Second, Defendants argue that Plaintiff has requested attorney's fees for time that is inapplicable to the Plaintiff's case. The contested time includes telephone calls with the press and correspondence regarding the case of Charles Guarnieri. ""Hours that would not generally be billed to one's own client are not properly billed to an adversary."" *Maldonado*, 256 F.3d at 184 (quoting *Pub. Interest Research*, 51 F.3d at 1188). Generally, press communications are not compensable. See *Heavens v. Golfview Estates, Inc.*,

Nos. 96 C 1294, 96 C 1318, 1997 WL 156486 (N.D. Ill. Mar. 31, 1997) (holding that generally press communications are not compensable, unless instigated by the opposing party). Therefore, the Court will not consider any time that Plaintiff's counsel spent speaking with the press. The number of hours claimed by Plaintiff for time with the press is two and nine-tenths (2.90) hours. This time will not be considered in Plaintiff's request for attorney's fees.

Defendants also note that several entries are inapplicable to Plaintiff Lohman's case, and only apply to the case of Charles Guarnieri. Specifically, the Defendants point to correspondence regarding health care enrollment forms, a call regarding an appointment with Charles Guarnieri, and travel to Wilkes-Barre for jury selection. The issue of healthcare enrollment was not raised in the *Lohman* case, and is only applicable to the *Guarnieri* case. Therefore, seven-tenths (.70) hours of time claimed regarding healthcare enrollment will be disregarded. Similarly, the telephone call to Charles Guarnieri

regarding his appointment also goes to the *Guarnieri* case, and that two-tenths (.20) hours of time will be disregarded. Finally the one (1.00) hour of time logged for travel to and from Wilkes-Barre for jury selection on April 7, 2008 will be disregarded, as only the *Guarnieri* jury was chosen on April 7th.

Therefore, the Court will disregard a total of four and eight-tenths (4.80) hours of time listed by the Plaintiff as inapplicable.

3. Excessive Hours

Defendants further argue that a number of Plaintiff's time entries are excessive. First, Defendants argue that the time Attorney Pollick worked on the trail dates is excessive. Ms. Pollick requests fees for 15.60 hours on April 18, 2008, 18.60 hours worked on April 19, 2008, 17.00 hours worked on April 20, 2008, 18.00 hours worked on April 21, 2008, and 19.40 hours worked on April 22, 2008.

Plaintiff argues that the number of hours requested on these dates is not excessive as "Plaintiff's counsel does not take breaks, nor leave the courthouse during

the trial day for lunch. Plaintiff's counsel is forced to burn the midnight oil since she has to prepare for all witnesses and argument because she stands alone at trial." (Pl.'s Br. at 15, Doc. 118.) Although the Court notes that Attorney Pollick was the only attorney representing the Plaintiff, the time requested on the days of trial is excessive. The Court finds that a fourteen (14.00) hour day during the day of trial is appropriate. Therefore, for April 18 through April 22, the Court will consider fourteen (14.00) hours per day. This is a reduction of eighteen and six-tenths (18.60) hours, from eighty-eight and six-tenths (88.60) hours to seventy (70.00) hours.

Defendants also note that Plaintiff's counsel asserts she worked thirteen and one-tenth (13.10) hours on April 6, 2008. (Doc. 109 Ex. A.) However, Plaintiff's counsel also asserted in her time sheets for the *Guarnieri* attorney's fees petition that she worked eleven and one-half (11.50) hours in support of *Guarnieri*. (*Guarnieri v. Duryea Borough, et al.*, 05-CV-1422, Doc. 122.) Thus, Plaintiff is asserting she

worked over twenty-four and six-tenths (24.60) hours in *one* day. This is not possible. Therefore, the Court will reduce the requested hours on April 6, 2008 by seven and one-tenth (7.10) hours to five (5) hours.

Defendants also argue that Plaintiff's time spent on the opposition to Defendant's summary judgment motion was excessive. Plaintiff's counsel asserts that she spent twenty-four (24) hours preparing the brief in opposition. Defendants argue that this is unreasonable. However, the Court disagrees, and finds that twenty-four (24) hours spent in preparation of an opposition to a summary judgment motion is not unreasonable.

Defendants also argue that fourteen (14.00) hours spent in preparation for voir dire on April 6, 2008 and April 20, 2008 is excessive. The Court agrees. The Court will reduce the amount of hours for voir dire from fourteen (14.00) hours to four (4.00) hours, a reduction of ten (10.00) hours.

Finally, Defendants argue that excessive time was listed for May 16, 2006 and September 14, 2006.

Defendants argue that Plaintiff's counsel submitted time sheets reflecting that she worked on attorney's fees motions in the *Guarnieri* case on those dates. However, the time listed on those two (2) dates were submitted on the time sheet that Plaintiff's counsel agreed was done in support of both the *Lohman* and *Guarnieri* cases. Therefore, those hours have already been reduced as duplicative, and need not be also considered as excessive.

The Court will reduce the Plaintiff's hours by thirty-five and seven-tenths (35.70) hours due to the excessive nature of the hours claimed.

4. Total Reduction in Hours

Plaintiff requested fees for a total of three-hundred and fifty-six (356) hours. The Court will reduce this number based upon duplicativeness, inapplicability, and excessiveness. First, the Court will reduce the number of hours by forty-six and eight-tenths (46.80) hours for duplicativeness. Second, the Court will reduce the number of hours by four and eight-tenths (4.80) hours for inapplicability. Third, the

Court will reduce the number of hours by thirty-five and seven-tenths (35.70) due to excessiveness. In total, the Court will reduce Plaintiff's request by eighty-seven and three-tenths (87.30) hours. The Court will permit a total of two-hundred and sixty-eight and seven-tenths (268.70) hours.

B. Reasonable Fee

Defendants also dispute the reasonableness of the hourly rate requested by Plaintiff Lohman's counsel. Plaintiff Lohman's attorney charges three-hundred dollars ($300.00) per hour. (Pollick Decl.¶ 11, May 6, 2008, Doc. 109 Ex. H.) In support of her rate, Attorney Pollick noted her qualifications. She is admitted to practice before the Supreme Court of the United States, the Pennsylvania Supreme Court, the Supreme Court of New Jersey, the United States Court of Appeals for the Third Circuit, the United States District Courts for the Eastern and Middle Districts of Pennsylvania, the United States District Court for the District of New Jersey and other local courts. (*Id.* ¶ 1.) She received her Masters of Law,

LLM, in Trial Advocacy from Temple University's Beasley School of Law in May 2002. (*Id.*) Ms. Pollick received her law degree from the University of Pittsburgh in 1999. (*Id.*)[1]

Ms. Pollick also mentioned her other qualifications.[2] Ms Pollick is currently an Adjunct Professor at King's College, where she teaches future human resource managers about civil rights laws. (*Id.* ¶ 5.) Ms. Pollick also teaches Employment and Labor Law at King's College, which she has done for four (4) semesters. (*Id.* ¶ 6.) Ms. Pollick's previous employment has included work as a law clerk to the Pennsylvania Human Relations Commission and as an associate at Lenahan & Dempsey. (*Id.* ¶¶ 7, 8.) Ms. Pollick currently operates her own law office, which she has

[1] Ms. Pollick states in her declaration that she graduated from Gerry Spence's Trial Lawyers College in August 2007. (Id.¶ 2.) The Court notes that Gerry Spence is a renowned trial lawyer. However, the Court will consider this fact in its determination of Ms. Pollick's fees, as the Court has no information regarding the curriculum or program structure.

[2] Prior to obtaining her law degree, Ms. Pollick was employed as a Human Resource Representative for almost four (4) years. (*Id.*¶ 3.) She is a member of the Society of Human Resources ("SHRM"), and was certified as a Professional in Human Resources ("PHR"). (*Id* ¶ 4.) Although Ms. Pollick lists these qualifications, they have no bearing on the petition for attorney's fees.

done for eight (8) years. (*Id.* ¶ 17.) She currently focuses her practice on employment discrimination claims and constitutional violations. (*Id.*¶ 9.)

"Generally, a reasonable hourly rate is calculated according to the prevailing market rates in the relevant community." *Maldonado*, 256 F.3d at 184. The district court "should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id. (*quoting *Rode v. Dellarciprete,* 892 F.2d 1177, 1183 (3d Cir. 1990)). Here, the Plaintiff "bears the burden of establishing by way of satisfactory evidence, "in addition to [the] attorney's own affidavits,'...that the requested hourly rates meet this standard." *Id.* (quoting *Washington v. Philadelphia Cty. Ct. Of Common Pleas,* 89 F.3d 1031, 1035 (3d Cir. 1996) (citing *Blum v Stenson,* 465 U.S. 886, 895 n.11 (1984))). The court should start with the attorney's usual billing rate, but this rate is not dispositive. *Id.*

Attorney Pollick notes that she works on a contingent fee basis, which should also effect the level of her fee. Ms. Pollick submitted a portion of her fee agreement with Mr. Lohman, but that contingent fee is not reflected in the document. (Doc. 118.) The document states "Counsel's hourly rate is $300.00, and is adjusted annually. Client agrees that such rate is reasonable for attorneys with the skill and experience of Counsel for this type of case." *(Id).* Ms. Pollick did not provide the terms of her contingency arrangement, therefore, the Court cannot use her contingent fee agreement in its consideration.

Along with her billing rate of three-hundred dollars ($300.00) per hour, Ms. Pollick submits rates of two (2) attorneys in the area, Mr. Barry H. Dyller and Mr. Paul M. Jennings. (Doc. 109 Exs. C, D, G.) Mr. Dyller charges three-hundred and thirty dollars ($330.00), and Mr. Jennings charges three-hundred dollars ($300.00). (Doc. 109 Exs. C, D, G.)

Defendants argue that Plaintiff's rate of three–hundred dollars ($300.00) is unreasonable, and that

the comparison of Attorney Pollick to Attorneys Dyller and Jennings is unsubstantiated. Ms. Pollick submits a letter from Mr. Jennings to Ms. Pollick. (Doc. 109 Ex.D.) In this letter, Mr. Jennings states that his client " has been paying three-hundred dollars ($300.00) per hour." (*Id.* at 2.) However, the letter does not outline any of Mr. Jennings' qualifications, which makes it impossible to compare the reputation, skill, and experience of Ms. Pollick to Mr. Jennings.

Plaintiff also submitted an affidavit of Mr. Dyller from 2006, which stated that his hourly fee was three-hundred and thirty dollars ($330.00) per hour. (Doc. 109 Ex. C, at 2.) In that affidavit, Mr. Dyller outlined his credentials. (*Id.* at 8.) Mr. Dyller graduated with honors from Boston University School of Law in 1985. (*Id.*) He practiced for seven (7) years in New York City working on major commercial disputes. (*Id.*) He founded his current firm in 1992, which handles civil rights litigation. (*Id.*) He has tried eighty-six (86) cases, eight-three (83) before a jury and three (3) bench trials. (*Id.*) Defendants assert that Mr. Dyller is a

well-established litigator in the Scranton/Wilkes-Barre area with numerous years of experience in trial litigation.

In response, Plaintiff's counsel asserts that her reputation, skill and experience is comparable to that of Mr. Dyller. She notes that she has her own law firm, which she has run for eight (8) years, and that she works on a contingency fee basis. However this is where the similarities end. Mr. Dyller has been in practice approximately fifteen (15) years longer that Ms. Pollick. He has tried eighty-six (86) cases. The number of trials in which Ms. Pollick participated is unknown. Ms. Pollick asserts that her experience as a human resource professional, work as a college professor, L.L.M. degree from Temple, and attendance at the Gerry Spence Trial Lawyers College make up for the difference in years of experience. However, the Court disagrees. First, Ms. Pollick's work as a human resource professional has no bearing on her claim for attorney's fees. Second, her attendance at the Gerry Spence Trial Lawyers College cannot be considered, as

the Court has no record of the curriculum or requirement of the school. Third, although Ms. Pollick has additional education from Temple, this additional value does not demonstrate that she has similar experience, skill, and reputation to Mr. Dyller. Finally, although Ms. Pollick works as a college professor, which Mr. Dyller does not, such work does not bridge the gap between their levels of experience

Defendants's counsel submitted declarations regarding their own experience in support of their argument that Attorney Pollick's rate is not representative of the similar service in the community. Attorney Karoline Mehalchick stated in her declaration that she charges one-hundred and twenty-five dollars ($125.00) for civil rights cases, and one hundred and seventy dollars ($170.00) in all other matters. (Mehalchick Decl. ¶¶ 9, 10, May 27, 2008, Doc., 115 Ex. A.) Ms. Mehalchick has been a partner at Oliver, Price & Rhodes and since January 2008. (*Id.* ¶ 1.) Her previous experience includes work as an associate attorney at Oliver, Price, & Rhodes and as a

law clerk to the Honorable Trish A. Corbett of the Lackawanna County Court of Common Pleas. (*Id.*¶¶ 2,3.) Ms. Mehalchick is a 2001 graduate of Tulane University School of Law, and is admitted to practice in the Pennsylvania Supreme Court, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Eight Circuit, the United States District Court for the Middle District of Pennsylvania, and the United States District Court for the Eastern District of Missouri. (*Id* ¶¶ 5,6.) She currently teaches a graduate class on Health Law at Marywood University. (*Id.* ¶ 7.)

Attorney Joseph O'Brien also submitted a declaration outlining his qualifications. (O'Brien Decl., May 27, 2008, Doc. 115 Ex. B.) Mr. O'Brien is a partner at Oliver, Price & Rhodes, where he has worked in that capacity for twenty-eight (28) years. (*Id.* ¶ 2.) He previously served as a law clerk to the Honorable Richard P. Conaboy, President Judge of the Court of Common Pleas of Lackawanna County and the Honorable William J. Nealon, Chief Judge of the

United States District Court for the Middle District of Pennsylvania. (*Id* ¶ 2.) He graduated with his juris doctor in 1975 from Seton Hall University with *cum laude* honors in 1975. (*Id.* ¶ 3.) Mr. O'Brien was a professor at Marywood University for thirty (30) years, teaching business law, taxation, and health law, among other classes. (*Id.* ¶ 6.) He also taught at the University of Scranton for three (3) years. (*Id.*¶ 7.) Mr. O'Brien charges an hourly rate of one-hundred and twenty-five dollars ($125.00) per hour for civil right cases, and two hundred and twenty-five dollars ($225.00) per hour on all other cases. (*Id.* ¶¶ 10, 11.)

Plaintiff's counsel argues that the declarations by Defendants are not indicative of the rates of similar services, because these declarations were made by members of the defense bar. Plaintiff argues that the Court should only consider the service of other attorneys in the plaintiffs bar in the community. The court is not limited to the defense bar or the plaintiffs bar in determining fees – rather, the court must consider the attorney's experience and skill, and

compare it to rates for similar services by attorneys with similar skill, experience, and reputation. *Rhode*, 892 F 2d at 1183. The skill and experience of Ms. Pollick is more closely aligned with Ms. Mehalchick, than with Mr. Dyller, Mr. Jennings, or Mr. O'Brien. Ms. Mehalchick and Ms. Pollick have been in practice for a similar number of years; both teach college classes; and both are involved with civil rights suits. A rate of three –hundred dollars ($300.00) per hour is not appropriate for Ms. Pollick's skill, reputation, and experience in the community. Therefore, the Court will award Ms. Pollick fees in the amount of two-hundred and fifteen dollars ($215.00).

C. Lodestar Calculation

1. Lodestar for Ms. Pollick

In order to calculate the lodestar, the Court must find the product of the reasonable hours times the reasonable fee. The Court found a reasonable number of hours to be two-hundred and sixty-eight and seven-tenths (268.70) hours. The reasonable fee was found to be two-hundred and fifteen dollars (215.00).

Therefore, the lodestar is calculated to be fifty-seven thousand, seven-hundred and seventy dollars and fifty cents ($57,770.50).

Plaintiff also requests one-thousand eight-hundred dollars ($1,800.00) for preparation of this fee petition. This would be six (6) hours times her requested rate. As the Court found that the reasonable rate would be two-hundred and fifteen dollars ($215.00), her lodestar for fees for preparation of the petition is reduced to one-thousand, two-hundred and ninety dollars ($1290.00).

The total lodestar inclusive of this fee petition for Ms. Pollick's fees is calculated to be fifty-nine thousand and sixty dollars and fifty cents ($59,060.50).

2. Legal Assistant Lodestar

Plaintiff also submits costs for work by legal assistants in the amount of four-thousand two-hundred and twenty-two dollars and fifty cents ($4,222.50). Ms. Pollick states that seven and nine-tenths (7.90) hours were done in support of both the

Lohman and *Guarnieri* cases. Defendants object to these hours as duplicative. For the reasons previously stated, the work done in support of both cases will be reduced by fifty percent (50%). Therefore, the work done by the legal assistants will be reduced by three and ninety-five-hundredths (3.95) hours.

In 2006, legal assistants did five and one-tenths (5.10) hours of work. In 2007, they did one and four-tenths (1.40) hours of work. In 2008, the legal assistants did forty-one and nine-tenths (41.90) hours of work. Therefore, the legal assistants totaled fifty-two and thirty –five-hundredths (52.35) hours of work on this case. Defendants do not dispute the other hours worked by the legal assistants as excessive, duplicative, or otherwise inapplicable. Plaintiff requests a fee of seventy-five dollars ($75.00) per hour for legal assistants. Defendants do not dispute this fee rate. Therefore, the lodestar for the legal assistants is product of fifty-two and thirty-five-hundredths (52.35) hours of work times seventy-five dollars ($75.00). The lodestar for legal assistants is calculated to be three-

thousand, nine-hundred and twenty-six dollars and twenty-five cents ($3,926.25).

3. Other Considerations

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. The Court will now consider these additional considerations.

The Twelve Johnson Factors

A court may consider other factors besides the reasonable rate times reasonable hours to adjust the fee upwards or downwards. *Hensley*, 461 U.S. at 434. In *Hensley*, 461 U.S. at 429-30, the Supreme Court held that "[t]he amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)." The twelve (12) factors are:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases._____

Id. at 430 n.3 (citing *Johnson*, 488 F.2d at 717-19). Many of these factors are subsumed in the rate times hours calculation, bu they may be considered as part of a court's consideration of overall fees. *Id.* at 434. *Hensley* noted that "the amount involved and the results obtained" is relevant to a fee award, and that "[t]he importance of this relationship is confirmed in

varying degrees by other cases cited approvingly in the Senate Report." *Id.* at 430. The Supreme Court found that appropriate fees result when the fees "are adequate to attract competent counsel, but ...do not produce windfalls to attorneys." *Id.* at 430 n.4.

E.Apportionment

Defendants argue that the number of hours requested by Plaintiff Lohman should be apportioned based upon the number of successful claims. The *Hensley* Court considered a case where plaintiffs brought multiple claims in one lawsuit. *Hensley*, 461 U.S. at 434-35. The Court noted that a fee award should be limited when a lawsuit brings different claims of relief based upon different facts and legal theories. *Id.* Fees should be limited in such a case when the work on one claim is unrelated to the work on another claim. *Id.* A court would treat these claims as if they were raised in separate lawsuits. *Id.* But, the Court noted that some cases involve a common core of facts or are based on related legal

theories. *Id.* at 435. In such a case, it would be difficult to divide the hours on a claim-by-claim basis. *Id.* The Court rejected a mathematical approach to reducing the fees by the ratio of claims on which the plaintiff prevailed. *Id.* at 435 n. 11.

The Court noted that if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* This excessive could arises "even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* In explaining the possibility of an excessive fee recovery, the Court emphasized that the degree of success obtained is the most critical factor. *Id.* ___

_____ In this case, most of Plaintiff's claims arose from a common core of facts, namely the speech surrounding Plaintiff Lohman, and his furlough as a result of his speech. Therefore, the Court will not apportion the fees by six-sevenths as requested by the Defendants. However, the Court will consider

the overall degree of success in determining the appropriate fee level.

F. Consideration of Settlement Negotiations

Defendants argue that the Court should consider the settlement negotiations prior to trial in determining a reasonable fee award. Defendants argue that Plaintiff achieved minimal success, as the Plaintiff's initial demand was five-hundred thousand dollars ($500,000.00) in compensatory and punitive damages, and received a jury verdict of twelve-thousand, two hundred and five dollars ($12,205.00). (Mehalchick Decl. ¶ 13, May 27, 2008, Doc. 115 Ex. A; O'Brien Decl. ¶ 14, May 27, 2008, Doc. 115 Ex. B; Jury Verdict Doc. 102.) The Defendants offered thirty-thousand dollars ($30,000.). Mehalchick Decl. ¶ 14 Doc. 115 Ex. A; O'Brien Decl. ¶ 15, Doc. 115 Ex. B.) After trial commenced, Defendants made three additional offers – twenty-five thousand dollars ($25,000) plus the job of chief of police, fifty-thousand dollars ($50,000) plus the job of chief of police, and seventy-five thousand dollars ($75,000) without the job

of chief. (Mehalchick Decl. ¶ 16, Doc. 115 Ex. A: O'Brien Decl. ¶ 17, Doc. 115 Ex. B.) These offers were rejected by the Plaintiff. (Mehalchick Decl. ¶ 16, Doc. 115 Ex. A; O'Brien Decl. ¶ 17, Doc. 115 Ex. B.) Plaintiff states that she was willing to resolve the matter for seventy-five thousand dollars ($75,000.00) and the position of chief, but the offer was "pulled" at the time Plaintiff was willing to accept. (Pollick Aff. ¶ 5, June 10, 2008. Doc. 118.) In contrast, the declarations of Defendants' counsel state that they offered seventy-five thousand dollars ($75,000.00) without the job of chief of police, and not that they offered the seventy-five thousand dollars ($75,000.00) with the job of chief of police.

In *Hensley v. Eckerhart,* 461 U.S. 424 (1983) the Supreme Court held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." *Id.* at 436. However, the Court specifically stated that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Id.*

Here, the question is whether the Court may consider the settlement negotiations in determining the degree of success achieved by Plaintiff's counsel.

Plaintiff argues that demands or offers of settlement cannot be used to reduce an award of attorney's fees. Plaintiff cites a District Court case from the District of New Jersey, *Alphonso v. Pitney Bowes, Inc.* 356 F. Supp. 2d 442 (D.N.J. 2005), where the court refused to use settlement negotiations in determining attorney's fees based on Federal Rule of Evidence 408. However, other district courts in the Third Circuit have yet to decide the issue. *See Barbee* v *Se Penna. Transp. Auth.*, Civ. A. No. 04-4063, 2007 WL 403881, at *1 n.2 (E.D. Pa. Feb. 1, 2007) (declining to determine whether Federal Rule of Evidence 408 bars use of settlement in post-trial briefing). Nor has the Third Circuit Court of Appeals issued a ruling on the use of settlement negotiations in the determination of attorney's fees. Other courts outside of this Circuit have held that Federal Rule of Evidence 408 does not bar consideration of settlement discussions from an

attorney's fee petition. *See EMI Catalogue Partnership* v *CBS/Fox Co.*, No. 86 Civ. 1149 (PKL), 1996 WL 280813, at *2 (S.D.N.Y. May 24, 1996)(finding that Rule 408 does not bar consideration of settlement discussions in determining whether to award attorney's fees under the Copyright Act).

Federal Rule of Evidence 408 states:

> (a) Prohibited uses. – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

> (b) Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include providing a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. In construing Rule 408, the Court finds the logic of *EMI Catalogue* to be persuasive. The District Court for the Southern District of New York held that "evidence of the alleged settlement negotiations is not being offered to prove 'either liability for or invalidity of the claim or its amount.' Rather, it is being offered to show that the Court's rejection of the claim should not merit an award of attorney's fees under the Court's power of equitable discretion." *EMI Catalogue*, 1996 WL 280813, at *2. The court further held that:

> [b]ecause nothing in the language of Rule 408 requires exclusion of evidence of settlement negotiations on issues "other than liability for or invalidity of a claim or its amount." The Court can consider evidence of settlement negotiations where, as here, that evidence is probative of the objective unreasonableness of the claim for

> purposes of determining whether to award attorney's fees under the Copyright Act.

Id. The Court agrees with the District Court for the Southern District of New York that evidence of settlement negotiations is not barred in an application for attorney's fees. The evidence is not used to show liability or validity of a claim or amount. Rather, the settlement negotiations are to be used as an indicator of the "degree of success obtained" by Plaintiff's counsel. *Hensley*, 461 U.S. at 436. The fact that Plaintiff prevailed at trail may not be entirely indicative of counsel's success. *Id.* Therefore, the Court will consider the settlement negotiations in its determination of Plaintiff's attorney's fee award. __

____*G. The Court's Award of Fees*

_____Ms. Pollick's lodestar was calculated to be fifty-nine thousand and sixty dollars and fifty cents ($59,060.50). The lodestar for her legal assistants is calculated to be three-thousand, nine-hundred and twenty-six dollars and twenty-five cents ($3,926.25). This totals sixty-two thousand, nine-hundred and

eight-six dollars and seventy-five cents ($62,986.75).

In this case, the Court finds that the lodestar, or the product of the reasonable rate times the reasonable hours, results in an excessive fee award. As per *Hensley,* a court may consider other facts in determining an award. *Hensley,* 461 U.S. at 434. The degree of success obtained for Ms. Pollick was not as great as she claims. Of the six (6) claims in the Complaint, only the First Amendment claims went to trial. Of the claims that were presented to the jury, only one (1) claim returned a verdict in favor of the Plaintiff.

Furthermore, the Court notes that the Plaintiff's counsel may have achieved a much greater level of success of Plaintiff had settled the case. A seventy-five thousand dollars ($75,000.00) result in settlement is significantly greater than the twelve-thousand two-hundred and five dollar ($12,205.00) result obtained at trial. Plaintiff noted that she worked on a contingent fee basis. Had Plaintiff settled for the seventy-five thousand dollars ($75,000.00), counsel would only have been entitled to about twenty-five

thousand dollars ($25,000.00), as contingent fee agreement often call for approximately thirty-three percent (33%). If she had a contingent fee agreement of forty-percent (40%), she would have received thirty-thousand dollars ($30,000.00). Likewise, a contingent fee of the jury's verdict would have yielded four-thousand and sixty dollars and thirty-three cents ($4068.33) and four-thousand, eight-hundred and eight-two dollars ($4882.00) respectively.

Plaintiff's counsel argues that she achieved "excellent" results for her client, especially because this trial followed on the heels of another trial. The fact that this trial followed another is not relevant. While she focuses on the fact that she received a jury verdict in her favor, her client received a lesser result from trial than from settlement, and only prevailed on one claim. In this case, the results obtained at trial do not justify an award of over sixth-thousand dollars ($60,000.00) as calculated by the lodestar, and surely does not justify the requested fees of over one-hundred thousand dollars ($100,000.00).

_____The *Johnson* factors, other than the results obtained factor, also justify a reduced award. The skill requisite to perform the services was not particularly rigorous – Plaintiff's counsel often brings First Amendment retaliation claims, and such a claim is not a new or novel issue of law. The claims were not particularly difficult. In fact, the claims were very similar to those in the *Guarnieri* case. Counsel did not demonstrate any special ability in the prosecution of the case. The case cannot be considered "undesirable" – there is no evidence that Mr. Lohman was unable to attract other attorneys to this case. These factors weigh in favor of a downward departure from the lodestar.

Based upon the *Johnson* factors, including the results obtained factor, the Court finds that a downward departure of the lodestar is warranted, and Plaintiff will be awarded a total of thirty thousand dollars ($30,000.00) in attorney's fees. Such an award is comparable to the award Plaintiff's counsel would have received had the Plaintiff settled for the maximum settlement offer, and substantially greater than one she

would have received under a normal contingent fee of the verdict.

Costs

_____Plaintiff's counsel also submits costs in the amount of six-thousand and sixty-one dollars and twenty-three cents ($6,061.23). Plaintiff notes that three-thousand, six-hundred and eleven dollars and sixty cents ($2,611.60) in costs were in support of both the *Lohman* and *Guarnieri*. The Court will divide these costs in half, and one-thousand, eight-hundred and five dollars and eight cents ($1805.80) will be awarded in costs for work done on both cases.

The remaining costs total two-thousand, four-hundred and forty-nine dollars and sixty-three cents ($2449.63). Of these costs, Defendants object to the costs of telephone calls to the press and the purchase of a soda at a deposition. The Court agrees that these are inappropriate costs. Therefore, the Court will reduce these costs by three dollars and sixty-six cents ($3.66).

The Court will award the sum of one-thousand, eight hundred and five dollars and eight cents

($1805.80) and two-thousand, four-hundred and forty-five dollars and ninety-seven cents ($2445.97). In total, the Court will award four-thousand, two-hundred and fifty-one dollars and seventy-seven cents ($4241.77) in costs.

CONCLUSION

For the reasons stated above, Plaintiff's request for attorney's fees and costs (Doc. 109) will be granted in part and denied in part.

An appropriate Order follows.

July 30, 2008
Date

/s/ A. Richard Caputo
A. Richard Caputo

United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Nicholas Lohman,	:	
	:	
Plaintiff,	:	NO. 3:05-CV-1423
	:	
v.	:	(JUDGE CAPUTO)
	:	
Duryea Borough, et al.,	:	
	:	
Defendants	:	

ORDER

NOW, this 30th day of July 2008, IT IS HEREBY ORDERED that Plaintiff's motion for attorneys' fees and costs (Doc. 109) is GRANTED IN PART and DENIED IN PART as follows:

(1) Attorney's fees for Ms. Cynthia Pollick are awarded in the amount of thirty thousand dollars ($30,000.00).

(2) Costs are awarded in the amount of four-thousand, two-hundred and fifty-one dollars and seventy-seven cents ($4251.77).

/s/ A. Richard Caputo
A. Richard Caputo
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3524

NICHOLAS LOHMAN,

Appellant

v

DUYREA BOROUGH; DURYEA BOROUGH COUNCIL;
ANN DOMMES, Individually and
in her official capacity as Council President;
LOIS MORREALE, Individually and
in her official capacity as Borough Secretary;
FRANK GROBLEWSKI, Individually and
in his official capacity as Councilman;
EDWARD ORKWIS, Individually and
in his official capacity as Councilman;
ROBERT WEBB, Individually and
in his official capacity as Councilman;
AUDREY YAGER, Individually and
in her official capacity as Councilwoman;
JOAN ORLOSKI, Individually and
in her official capacity as Councilwoman.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 05-cv-01423)
District Judge: Honorable A. Richard Caputo

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and GARTH, *Circuit Judges, and PADOVA,** District Judge.

*The vote of Honorable Leonard I. Garth, Senior Judge of the United States Court of Appeals for the Third Circuit is limited to panel hearing only.

** The vote of Honorable John R. Padova, Senior Judge of the United States District Court for the Middle District of Pennsylvania, sitting by designation, is limited to panel rehearing only.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other

available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the Petition for Rehearing is hereby DENIED.

BY THE COURT:
/s/ Marjorie O. Rendell
Circuit Judge

Dated: December 22, 2009
DWB/cc:
Cynthia L. Pollick, Esq.
Karoline Mehalchick, Esq.

* Honorable John R. Padova, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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(2)

No. 09-1147

Supreme Court, U.S.
FILED
APR 21 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NICHOLAS LOHMAN,

Petitioner,

v.

DURYEA BOROUGH, DURYEA BOROUGH COUNCIL, ANN DOMMES, LOIS MORREALE, FRANK GROBLEWSKI, EDWARD ORKWIS, ROBERT WEBB, AUDREY YAGER and JOAN ORLOSKI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's consideration of settlement negotiations in determining an award of attorney fees does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Third Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's consideration of the hourly rates of defense counsel in this case does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Third Circuit's ruling implicates an important federal question that has not been settled by this Court.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties remaining in the case.

CORPORATE DISCLOSURE STATEMENT

Respondents, Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager and Joan Orloski, are a municipality and its governing body, Borough Council, the individual members of council and the Borough's Borough Secretary. As such, Respondents are government entities and are not corporations, do not have any parent corporation or any corporate stock.

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STATEMENT OF THE CASE

Petitioner, Nicholas Lohman ("Lohman"), brought the underlying action against Respondents, Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager and Joan Orloski ("Duryea Borough"), alleging violations of the procedural component of the Fourteenth Amendment, First Amendment retaliation claims, publicity given to a private life and wrongful discharge. Pet. App. 16. At the close of discovery, Duryea Borough moved for summary judgment on all counts. The District Court granted summary judgment on all claims except Lohman's claims of First Amendment retaliation, which proceeded to trial. *Id.* At the close of Lohman's case, the District Court dismissed Respondents Orkwis and Morreale from the case on a motion for judgment as a matter of law. *Id.* The jury reached its verdict on April 23, 2008. The jury found in favor of Lohman on his First Amendment retaliation claim with respect to his assistance in filing a grievance against all Respondents except Robert Webb. They found in favor of all Respondents on Lohman's claim of First Amendment retaliation with respect to his union contract negotiations. Pet. App. 16-17. For his successful claims, the jury awarded Lohman damages for lost wages in the amount of $7,320.00 against Duryea Borough and $1,220.00 each against Dommes, Groblewksi, Yager and Orloski. The jury also awarded one dollar in nominal damages against all Respondents except Robert Webb. Pet. App. 17.

Lohman's initial demand to settle this matter was five-hundred thousand dollars ($500,000.00) in compensatory and punitive damages. Pet. App. 46. Duryea Borough offered thirty-thousand dollars ($30,000.00). *Id.* After trial commenced, Duryea Borough made three additional offers – twenty-five thousand dollars ($25,000) plus the job of chief of police, fifty-thousand dollars ($50,000.00) plus the job of chief of police, and seventy-five thousand dollars ($75,000.00) without the job of chief of police. Pet. App. 46-47. These offers were rejected by Lohman. Pet. App. 47.

Following the verdict at trial, Lohman requested attorney's fees and costs in the amount of $112,883.73. Pet. App. 18. The request sought an hourly rate determination of $300.00 for a total of 356 hours. Pet. App. 20. Duryea Borough opposed Lohman's request and made very specific objections to each and every problematic time entry. The District Court reduced the total number of hours by 46.8 hours for duplicativeness, 4.80 hours for inapplicability, and 35.70 hours due to excessiveness. Pet. App. 21-30. Those reductions have not been appealed by Lohman.

The District Court next determined that the appropriate hourly rate for Plaintiff's counsel was $215. The District Court, who is very familiar with Plaintiff's counsel's work and skill, reached this rate by analyzing the affidavits submitted by both Lohman's counsel and those submitted by counsel for Duryea Borough. Pet. App. 30-39.

The above calculations resulted in a total lodestar calculation of $59,060.50. Pet. App. 40. The District Court then made additional considerations as to whether to adjust the fee upward or downward, specifically looking at the *Johnson*[1] factors, apportionment, settlement negotiations, and the degree of success obtained. Based on these additional considerations, the District Court adjusted its fee award to $30,000.00. Pet. App. 54.

The District Court, in reducing the lodestar, noted that this Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." Pet. App. 47; *citing Hensley* at 436. In construing Federal Rule of Evidence 408, which governs the use of settlement negotiations, the District Court found a decision by the District Court for the Southern District of New York to be persuasive. That decision held that "evidence of the alleged settlement negotiations is not being offered to prove 'either liability for or invalidity of the claim or its amount.' Rather it is being offered to show that the Court's rejection of the claim should not merit an award of attorney's fees under the Court's power of equitable discretion." Pet. App. 50; *citing EMI Catalogue Partnership v. CBS/Fox Co.*, No. 86 Civ. 1149 (PKL), 1996 WL 280813, at *2 (S.D.N.Y. May 24, 1996) (finding

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[1] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

that Rule 408 does not bar consideration of settlement discussions in determining whether to award attorney's fees under the Copyright Act). The District Court in this case agreed with the reasoning of the District Court for the Southern District of New York that evidence of settlement negotiations is not barred in an application for attorney's fees, since the same is not used to show liability or validity of a claim or amount. Pet. App. 51. Relying on this Court's decision in *Hensley*, the District Court concluded that the settlement negotiations are to be used as an indicator of the "degree of success obtained" by Plaintiff's counsel, and that it would therefore consider the settlement negotiations in its determination of Plaintiff's attorney's fee award. Pet. App. 51; *citing Hensley*, 461 U.S. at 436.

Lohman then appealed the District Court's award of attorney's fees to the Third Circuit, which affirmed the award. The Third Circuit addressed Lohman's appeal of the District Court's determination of his counsel's hourly rate in a footnote, in which it acknowledged that a district court's determination of an attorney's reasonable hourly rate will not be upset unless found to be clearly erroneous, and further that there was ample evidence to support the Court's lower rate. Pet. App. 4.

In reviewing the District Court's consideration of settlement negotiations, the Third Circuit agreed that

> . . . Rule 408 does not bar a court's consideration of settlement negotiations in its

> analysis of what constitutes a reasonable fee award in a particular case. By its terms, Rule 408 requires exclusion of evidence of such negotiations "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction."

Pet. App. 10.

The Third Circuit further held that evidence of settlement negotiations as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408, and that such evidence can be relevant when determining the degree of success. Pet. App. 11; *citing Hensley*, 461 U.S. at 436 ("[t]here is no precise rule or formula" for determining how a fee should be adjusted to reflect limited success). The Third Circuit affirmed the District Court's consideration of settlement negotiations, concluding that "[w]hile evidence of settlement negotiations is only one indicator of the measure of success, it is a permissible indicator that is not precluded by Rule 408." Pet. App. 11. In reaching this conclusion, the Third Circuit rejected Lohman's public policy argument and argument that Federal Rule of Civil Procedure 68, Offer of Judgment, precludes the consideration of settlement negotiations by the District Court. Pet. App. 12-13. Finally, the Third Circuit noted that settlement negotiations *may* be relevant in measuring success, and, if so, are clearly only one factor to be considered in the award of fees, and remarked that in

this case, the District Court considered many factors before awarding Lohman's counsel a fee of $30,000.00. Pet. App. 13-14.

Following the denial of a Petition for Rehearing *En Banc* (Pet. App. 61), Lohman filed the instant Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

Lohman submits that this Court should grant its Petition for Writ of Certiorari in order to rule on the issues of whether settlement negotiations may be used to reduce a fee petition, and whether the lower courts improperly considered defense counsel's hourly rates in determining the market rate for civil rights plaintiffs' attorneys. Duryea Borough submits that Lohman has not carried his burden of demonstrating "compelling reasons" for this Court to grant his Petition. *See* Supreme Court Rule 10. The decisions of the Third Circuit Court of Appeals and the District Court for the Middle District of Pennsylvania do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. *Id.*

I. Contrary to Lohman's assertion, there is no compelling reason for review of the decisions of the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania on the issue of consideration of settlement negotiations in determining a reasonable attorney's fee award.

Lohman incorrectly avers that there is a split in the circuits as to whether settlement negotiations can be used to reduce a fee petition. Pet. at 2. In support of his argument that such a circuit split exists, Lohman cites to cases out of the Second, Fourth and Tenth Circuits. However, these cases are all distinguishable from the case at bar and do not, as Lohman would lead this Court to believe, stand for the proposition that settlement negotiations cannot be considered in reducing a fee petition. As the Third Circuit noted, " . . . the cases relied on by Lohman regarding Rule 68 are factually distinguishable and do not set forth a categorical rule that applies here." Pet. App. 14; *Lohman v. Duryea Borough*, 574 F.3d 163, 169 n.4 (3d Cir. 2009). Specifically, the Third Circuit panel distinguished these cases as follows:

> In *Ortiz v. Regan*, 980 F.2d 138 (2d Cir. 1992), the Court of Appeals for the Second Circuit rejected a district court's denial of fees for work performed by plaintiff's counsel after the defendants offered the plaintiff a post-deprivation hearing. Instead of requesting a hearing, plaintiff proceeded with her due process claim based on defendants'

conduct prior to the suspension of her retirement benefits. The court of appeals stated that the "availability of Rule 68" provided "additional weight" for its conclusion that the district court abused its discretion by cutting off all fees incurred after the rejected offer. *Id.* at 141. The District Court here did not cut off all fees incurred after Lohman rejected Appellees' settlement offer.

In *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), the Court of Appeals for the Fourth Circuit concluded that a district court erred in applying Rule 68, because the offer in question did not meet the formality requirements of the Rule. *Id.* at 423. The case at bar does not involve any application of Rule 68.

In *Cooper v. Utah*, 894 F.2d 1169 (10th Cir. 1990), the Court of Appeals for the Tenth Circuit determined that a district court erred by reducing a fee award to one half of the lodestar based on simplicity of issues, because simplicity of issues should have been factored into the determination of the lodestar. *Id.* at 1171. In a terse statement, the court "[a]dditionally" noted that the district court's reduction of fees in light of settlement negotiations was "not well-founded" where defendants failed to make an offer of judgment under Rule 68. *Id.* at 1172. There is no indication that the district court's use of settlement negotiations in *Cooper* was analogous to the application in this case, nor is it

> clear that the settlement issue was necessary to the holding on appeal.

Id.

The cases relied upon by Lohman, *Ortiz*, *Clark*, and *Cooper*, do not stand for the proposition that a court may not consider settlement negotiations when determining an award of attorney fees. While the Third Circuit, in this case, and the Seventh Circuit, in *Moriarty v. Svec, et al.*, 233 F.3d 955 (7th Cir. 2000),[2] have held that a court should consider settlement offers as a factor in determining an award of reasonable attorney fees, no other Circuit Court of Appeals has specifically addressed this issue. As such, there is no split in the Circuits on this issue, and therefore no compelling reason for this Court to grant Lohman's Petition for Writ of Certiorari.

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[2] In *Moriarty*, a case which involved claims pursuant to the Employee Retirement Income Security Act ("ERISA") and the Labor Management Relations Act ("LMRA"), the Seventh Circuit held that "substantial settlement offers should be considered by the district court as a factor in determining an award of reasonable attorney's fees, even where Rule 68 does not apply." 233 F.3d 955 at 967. The Seventh Circuit further stated that the "district court must only consider the substantial settlement offer; it need not reduce the lodestar calculation because of the offer." *Id.*

II. Contrary to Lohman's assertion, there is no compelling reason for review of the decisions of the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania on the issue of Lohman's counsel's hourly rate.

Lohman asserts that it was improper for the District Court (and the Third Circuit, in affirming the District Court) to consider defense counsel's rates in determining Lohman's counsel's rates. Lohman does not present any compelling reason for this Court to grant his Petition for Writ of Certiorari on this issue. There is no split in the Circuits or otherwise compelling federal question which would require review by this Court.

Moreover, the matter of an attorney's marketplace billing rate is a factual question which is subject to a clearly erroneous standard of review. *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir. 1996); *citing Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, [illegible] (3d Cir. 1988) (*citing Black Grievance Committee v. Philadelphia Electric Co.*, 802 F.2d 648, 652 (3d Cir. 1986) (citation omitted), *vacated on other grounds*, 483 U.S. 1015, 107 S. Ct. 3255, 97 L. Ed. 2d 754 (1987)). More generally, the appellate court may not upset a trial court's exercise of discretion on the basis of a visceral disagreement with the lower court's decision. Similarly, the appellate court may not reverse where the trial court employs correct standards and procedures, and makes

findings of fact not clearly erroneous. *Id.* In this case, the Third Circuit concluded, in a footnote, that

> . . . there was ample evidence to support the [District] Court's lower rate and we conclude that the [District] Court did not clearly err in choosing the rate that it did. *See Interfaith Comty. Org. v. Honeywell Intern., Inc.*, 426 F.3d 694, 703 n.5 (3d Cir. 2005) ("[W]e will not upset a district court's factual determinations, including its determination of an attorney's reasonable hourly rate and the number of hours he or she reasonably worked on the case, unless we find them to be clearly erroneous.").

Pet. App. 4; *Lohman v. Duryea Borough*, 574 F.3d 163, 164 n.1 (3d Cir. 2009).

The opinions of the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania on the issue of Lohman's counsel's hourly rate are not clearly erroneous. Moreover, the opinions comport with the law of the Third Circuit, and are in harmony with every other Circuit. For the foregoing reasons, Lohman has not met his burden in establishing that there is a compelling reason for this Court to grant his Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). As such, this Court should deny Lohman's Petition.

CONCLUSION

For the foregoing reasons, Respondents, Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager and Joan Orloski, respectfully submit that this Court should deny Lohman's Petition for a Writ of Certiorari.

Respectfully submitted,

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